IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16/12/2002

CORAM

THE HONOURABLE MR.JUSTICE M.KARPAGAVINAYAGAM
AND
THE HONOURABLE MR.JUSTICE P.THANGAVEL

CRL.A. NO. 810 OF 1998

1.Thavaraj Pandian
2.Palani
3.Raja
4.Packianathan ..Appellants

-Vs-

State, rep. by
Inspector of Police,
G-1, Thilagar Thidal
Police Station (Crime),
George Town (North),
Madurai. ..Respondent

Criminal Appeal against the judgment dated 12-8-1998 in S.C. No.307 of 1994 on the file of the Principal Sessions Court, Madurai.

!For appellants 1 and 2: Mr. N.Ramu
For appellants 3 and 4: Mr. V.Gopinath,
Senior Counsel for
Ms.N.S.Nappinai

^For respondent : Mr. E.Raja, Addl.P.P.

:JUDGMENT

M.KARPAGAVINAYAGAM,J.

Latha, an young house wife was alone in her house in the morning hours of 23-6-1992, after sending her husband to his shop for attending his business. The appellants/A-1 to A-4 gained entry into her house knowing that she was alone, threatened her to part with her jewels and when she refused, the accused stabbed her causing death and took away the jewels including mangalya sutra from her body and sped away with the booty.

2. With the abovesaid allegations, the first appellant/A-1 and the third appellant/A-3 were convicted for the offences under Sections 120 -B I.P.C., 302 read with 34 and 394 I.P.C. and each sentenced to undergo life imprisonment for the offences under Sections 120-B and 302 read with 34 I.P.C. and rigorous imprisonment for ten years for the offence under Section 394 I.P.C., the second appellant/A-2 was convicted for the offences under Sections 120-B, 302 and 394 I.P.C. and sentenced to undergo life imprisonment for the offences under Sections 1 20-B and 302 I.P.C. and rigorous imprisonment for ten years for the offence under Section 394 I.P.C. and the fourth appellant/A-4 was convicted for the offences under Sections 120-B and 302 read with 34 I. P.C. and sentenced to undergo life imprisonment for each offences. The sentences were directed to run concurrently. Challenging the said conviction and sentence, the appellants/A-1 to A-4 have preferred this criminal appeal.

3. The case of the prosecution in brief is as follows:-
"(a) The deceased Latha is the wife of P.W.2 Ganesan. P.W.1 Vijayaraghavan is the son of P.W.2's sister. The deceased and P.W.2 were residing in No.81, Thanappa Mudali Street, Madurai. P.W.1 along with his parents, was staying in the house situated in the neighbouring street.

(b) On 23-6-1992, at about 10 a.m., P.W.2 Ganesan, the husband of the deceased went to his jewellery shop to attend his business. At about 10.30 a.m., A-1 to A-4 entered into the house of the deceased and murdered the deceased with the knife and took away the thali chain and gold jewels from her body and went away after locking the door.

(c) P.W.1 Vijayaraghavan, at about 2 p.m., came to the house of the deceased to hand over the ever-silver box containing fish sambhar sent by his mother. When he knocked the door, there was no response. Then, he found that the door was locked from outside. So, he opened the lock and entered into the house. To his shock, he found that the deceased Latha died with injuries. Jewels were found missing. P.W.1 telephoned and informed this to P.W.2, the husband of the deceased. P.W.2 rushed to the scene and found the dead body of his wife in a pool of blood and thali and gold bangles wer e missing.

(d) At about 4.15 p.m., on 23-6-1992, P.W.1 came to the Police Station and gave a complaint to P.W.10, the Sub-Inspector of Police. He registered a case and sent the complaint and F.I.R. to the Court and informed the message to the Inspector of Police.

(e) P.W.13 Inspector of Police, came to the scene and prepared Ex. P-2 observation mahazar and Ex.P-27 rough sketch. He conducted inquest. The inquest report is Ex.P-28. He recovered the blood stained sticks which contained cotton, spectacles and blood stained swabs (M.Os. 10 to 12).

(f) P.W.16, the finger print expert came to the scene as per the order in Ex.P-37. He visited the scene at about 5 p.m. and found out the chance prints in betel nut box (M.O.15). P.W.14 photographer of forensic laboratory took photos of chance prints found on the betel nut box M.O.15. The finger

print photo is M.O.13 and photo negatives are Ex.P-29 series. The report of the finger print expert is Ex.P-38.

(g) The intimation regarding the finger print expert are Exs.P-39 and P.40. They sent the betel nut box to the court on 3-7-1992.. along with the letter Ex.P-44.

(h) On 1-7-1992, P.W.13 handed over the investigation to P.W.15, another Inspector of Police. On 23-7-1992, P.W.15 arrested A-1 to A-3 and on the confession of A-1, M.O.1 thali and M.O.16 kerchief were recovered from him. In pursuance of the confession of A-2, M.O.4 gold bangles were recovered. From A-3, M.O.3 gold jewels were recovered. A-1 then took the Police and pointed out one Sivawami P.W.6 alleging that M.O.2 gold bangles were handed over to him. Accordingly, M.O.2 series were recovered from P.W.6. A-2 took th e Police to a graveyard and took out M.O.17 knife buried under the earth.

(i) On 24-7-1992 at about 2 p.m., P.W.15 arrested A-4 Packianathan and after obtaining his finger print M.O.14, he was sent for remand.

(j) P.W.12 another finger print expert, compared the finger prints of A-4 Pakcianathan and found that M.O.13, the chance prints in M.O.1 5 betel nut box got tallied with M.O.14, the finger print photo of A-4. Ex.P-45 is the report of the finger print expert P.W.12.

(k) After finishing investigation, P.W.15 filed charge-sheet on 12-1 0-1992."

4. A-1 to A-4 were tried for the offences under Sections 120-B, 302 and 302 read with 34 I.P.C. and 394 I.P.C. The defence of the accused is one of total denial. On conclusion of trial, the trial Court convicted A-1 and A-3 for the offences under Sections 120-B, 302 read with 34 and 394 I.P.C., A-2 was convicted for the offences under Sections 120-B, 302 and 394 I.P.C. and A-4 was convicted for the offence under Section 120-B and 302 read with 34 I.P.C. Aggrieved by the said conviction, the appellants/A-1 to A-4 have filed this common appeal.

5. Mr.Gopinath, learned senior counsel appearing for A-3 and A-4 and Mr.Ramu, learned counsel appearing for A-1 and A-2, while assailing the judgment of the trial Court, would make the following contentions:- "Though the occurrence took place on 23-6-1992, A-1 to A-3 were arrested only on 23-7-1992, after one month and recovered the jewels worn by the deceased. The witnesses who attested the mahazar for arrest and recovery, turned hostile. As such, the evidence relating to recovery of jewels cannot be accepted and at any rate, mere recovery of jewels would not conclusively prove that the accused committed murder of the deceased, especially when the jewels have been recovered after a long gap of one month and at the most, A-1 to A-3 could be convicted for the offence under Section 411 I.P.C."

6. While arguing on behalf of A-4, learned senior counsel would contend that there is no recovery from A-4 and only on the basis of the finger

print expert's report, A-4 has been convicted and since the finger print report has not been obtained by following the procedure under the Identification of Prisoners Act or under the Police Standing Orders, the same is not admissible and consequently, A-4 is liable to be acquitted.

7. Learned Additional Public Prosecutor, in reply to the above submissions, would contend that A-1 to A-3 were arrested on 23-7-1992 and the jewels which were identified by P.Ws.1 and 2 as that of the deceased and the knife which was used for committing the murder of the deceased, have been recovered. As such, the gap of one month, cannot be a ground to reject the said evidence in respect of the offences under Sections 302 and 394 I.P.C., especially when a presumption would arise under Sections 114 (a) and Section 106 of the Indian Evidence Act, in the absence of any explanation for the possession of jewels by A-1 to A-3. He would further submit that as far as A-4 is concerned, the evidence of the finger print expert, namely, P.W.12 clearly indicates that A-4 also came to the scene of occurrence and participated in the occurrence and since competent Police Officer has taken the finger print, there is no necessity for obtaining the order of the Magistrate concerned for taking finger print of A-4 as provided under the Identification of Prisoners Act. As such, the conviction and sentence imposed on the appellants/accused are liable to be confirmed.

8. Both the learned counsel for the appellants and learned Additional Public Prosecutor cited number of authorities in support of their contentions.

9. We have given our thoughtful consideration to the respective submissions made by learned counsel for the parties.

10. There is no dispute in the fact that the deceased was found murdered on 23-6-1992 at about 11 a.m., while she was alone in her house and the murder was committed for gain, as the thali chain and gold jewels totalling about 23 sovereigns were found missing from the body, as seen from the evidence of P.W.1 vijayaraghavan, the nephew of the deceased and P.W.2, the husband of the deceased and post mortem Doctor P.W.7.

11. According to the prosecution, P.W.1 Vijayaraghavan who is the relative of the deceased, came to the house of the deceased on 23-6-199 2 at about 2 p.m. to hand over the eversilver box containing fish sambhar given by his mother. Then, he opened the door as there was no response and found that the deceased was dead lying in a pool of blood with the injuries on the neck and hands. On receipt of information from P.W.1, P.W.2 husband rushed to the scene of occurrence and found that the thali and other gold bangles were missing.

12. P.W.13 Inspector of Police came to the scene and observed all formalities. He also requested P.W.14 photographer and P.W.16 finger print expert to come to the scene of occurrence. P.W.16 finger print expert found out the chance prints M.O.13 in the betel nut box M.O.15. Accordingly, P.W.14 photographer took photo of the chance prints. Till that stage, the

investigating agency was not able to know the identity of the culprits who participated in the occurrence.

13. P.W.15, another Inspector of Police, who took up further investigation, arrested A-1 to A-3 on 23-7-1992 when they were standing near Thiruparangundram. In the presence of witnesses, namely, P.W.5 Dharmaraj and P.W.11 Selvaraj, the confession statements of the accused were recorded separately. In pursuance of the confession from A-1, M.O.1 thali and M.O.16 kerchief were recovered under mahazar Ex.P-31. A-2 also gave confession and in pursuance of the same, M.O.4 gold bangles were recovered under Ex.P-33. On recording confession from A-3, M.O.3 another set of gold jewels were recovered from him under Ex.P-34.

14. On the same day, i.e., on 23-7-1992, A-1 took P.W.15 Inspector of Police to P.W.6 Sivasami with whom he pledged the other two bangles, namely, M.O.2 series. When A-1 pointed out P.W.6, P.W.15 interrogated and recovered M.O.2 series from P.W.6 under Ex.P-35. Besides this, A-2 took P.W.15 to Manikuravan Graveyard and took out M.O.17 the knife, the weapon of the offence and handed over the same to P.W.15 . This was recovered under Ex.P-36.

15. Next day, i.e. on 24-7-1992, P.W.15 arrested A-4 and no recovery was made from him. However, he obtained the finger print of A-4 and sent him for judicial remand.

16. The said finger print M.O.14 was compared by P.W.12 finger print expert with M.O.13, the chance prints found on the betel nut box M.O.15 and gave a report Ex.P-26, stating that the chance prints found on the betel nut box tallied with the finger prints of A-4.

17. Thus, it is clear that the evidence against A-1 to A-3 is the recovery of jewels belonging to the deceased from them and the evidence against A-4 is the presence of his finger prints at the scene.

18. Let us now deal with the evidence relating to the recovery of jewels and knife from A-1 to A-3.

19. In the complaint given by P.W.1 on the date of occurrence on 23-6-1992, it has been specifically stated that the thali chain of 15 sovereigns and 4 gold bangles of 8 sovereigns were found missing from the body of the deceased. After recovery of the jewels on 23-7-1 992, P.W.2 identified the jewels in the Police Station that those jewels were worn by the deceased on the date of occurrence. The thali chain which was recovered from A-1 was marked as M.O.1 and gold bangles which were recovered from P.W.6 at the instance of A-1 were marked as M.O.2 series and another set of gold bangles which were recovered from A-3 were marked as M.O.3 series and another set of bangles which were recovered from A-2 were marked as M.O.4. P.W.2 would specifically identify these jewels marked as M.Os.1 to 4, as that of the jewels of the deceased. This has not been challenged.

20. It is true that P.W.5 and P.W.11 who attested the mahazar for arrest and recovery of these jewels from the accused turned hostile. But merely because

the mahazar witnesses turned hostile, it cannot be straightaway held that the evidence relating to the arrest and recovery is false. It is equally true that P.W.6, from whom M.O.2 series were recovered at the instance of A-1 also turned hostile. In this case, we have got the evidence of P.W.15, the investigating officer who speaks about the arrest and recovery of the jewels from the accused as well as from P.W.6. Apart from that, P.W.15 recovered M.O.1 7 knife in pursuance of the confession given by A-2 from the graveyard.

21. The fact that P.Ws.5,6 and 11 turned hostile would not automatically make the evidence of P.W.15 unreliable. If the evidence adduced by P.W.15 is otherwise reliable, there is no difficulty in holding that the prosecution has proved the arrest and recovery of articles from the accused persons.

22. On going through the evidence of P.W.15, it is clear that A-1 to A-3 were arrested on the same day in the same place and on their separate confessions, M.Os.1 to 4 and 17 were recovered. His evidence is clear and cogent and in the cross-examination, nothing was elicited from him that he was speaking falsehood against A-1 to A-3. As such, there is no reason to reject the evidence of P.W.15 who arrested the accused and recovered the jewels which were identified by P.W.2, the husband of the deceased that those jewels were worn by the deceased on the date of occurrence.

23. It is contended by learned counsel for the appellants that mere recovery of jewels and belongings of the deceased would not be enough to fasten the liability on the accused for the offences of murder and robbery under Sections 302 and 394 I.P.C., especially, when there is one month gap between the date of occurrence and the date of recovery of the M.Os.

24. Citing a decision of the Supreme Court reported in AIR 1997 SC 3 954 (RAMBILAS VS. STATE OF MADHYA PRADESH) and a decision of the Division Bench of this Court reported in 2000 (III) C.T.C. 151 (RAJU VS. STATE), it is contended on behalf of the accused A-1 to A-3 that mere recovery of certain incriminating articles at the instance of the accused, cannot form the basis for conviction.

25. Relying upon the decisions of the Supreme Court reported in 1993 S.C.C. (Crl.) 999 (UNION TERRITORY OF GOA VS. BEAVENTURA D'SOUZA), 1 980 Crl.L.J. 1270 = AIR 1980 SC 1753 (NAGAPPA DONDIBA VS. STATE OF KARNATAKA) and 1982 Crl.L.J. 610 = AIR 1982 SC 129 (AMAR SINGH VS. STATE OF M.P.), it is argued by learned senior counsel for the appellants 3 and 4 that in the absence of any other evidence except recovery to connect the accused with the murder, the accused would be liable to be convicted only under Section 411 I.P.C. and not under Section 302 or 394 I.P.C. Learned senior counsel for A-3 and A-4 also relied on a decision of the Supreme Court reported in 2 001 SCC (CRL) 235 (MANISH DIXIT VS. STATE OF RAJASTHAN) in support of his submissions.

26. On the other hand, on the strength of the decisions of the

Supreme Court reported in 1998 S.C.C. (Crl) 220 (A.DEVENDRAN VS. STATE OF TAMIL NADU) and 2000 AIR SCW 2060 (EZHIL VS. STATE OF TAMIL NADU), it is contended by learned Additional Public Prosecutor that in the facts and circumstances of the case, in so far as the recovery of the jewels from A-1 to A-3 is concerned, a presumption under Section 114 (a) of the Indian Evidence Act would arise and as such, a presumption can be drawn not only for the fact that the accused were in possession of the stolen articles after committing robbery, but also committed the murder of the deceased in the absence of any explanation from the accused.

27. It is true as pointed by the learned counsel for the accused that the Supreme Court would hold in several decisions that the recovery of articles which were found stolen from the body of the deceased, would make out only the offence under Section 411 I.P.C. But, it is to be noted that in the very same decisions, it is observed that in the absence of any explanation from the accused for the possession of jewels stolen from the deceased, then a presumption can be drawn and even that depends upon the facts and circumstances of each case. It is also observed in some given cases, the pre sumption is further extended to the extent of holding that such a person committed the offence of murder also.

28. In this case, admittedly, the recovery of articles and arrest of the accused is after one month. But, mere lapse of one month will not compel the Court to come to a conclusion that the presumption cannot be drawn and as such, the accused had not committed the murder.

29. Whether a presumption under Section 114 (a) of the Indian Evidence Act, is drawn in a given situation, is a matter which depends on the evidence and the circumstances of each case. The nature of the stolen articles, the nature of its identification by the owner, the places and circumstances and its recovery, the intervening period between the date of offence and date of recovery, the explanation of the person from whom the recovery is made, are all factors which are to be taken into consideration in arriving at a decision of this Court.

30. When the prosecution succeeded in proving beyond any doubt that the commission of murder and robbery formed part of one transaction and the unexplained possession of the stolen property by the accused, would certainly justify the presumption that it was the accused and no one else had committed the murder and robbery.

31. Though, the time factor, namely the intervening period is important, it is settled law that no standard time limit can be fixed to determine whether the possession is recent or otherwise. Each case must be judged on its own facts. In a case where there is no possible explanation by the accused for the lawful possession of articles belonging to the deceased, the Courts cannot be held to be in error in considering that the murder and robbery were integral parts of the same transaction giving rise to the presumption that the appellants not only committed the murder of the deceased, but also committed robbery of articles found in possession of the deceased.

32. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies, as the stolen articles is or is not calculated to pass readily from hand to hand. As held by the Supreme Court, the stolen articles were such, as were not likely to pass readily from hand to hand, even the period of one year that lapsed cannot be said to be too long, particularly when the accused had been absconding during that period.

33. The abovesaid principles have been laid down in the following decisions:-
(a) 2001 SCC (CRL) 449 = AIR 2001 SC 979
(SANJAY VS. STATE (NCT OF DELHI);
(b) 2002 AIR SCW 2060 (supra) and
(C) 1998 SCC (Crl) 220 (supra).

34. As laid down by the Supreme Court in the above decisions, the time factor would not mean a particular time limit. It varies according to the facts and circumstances of each case.

35. In this case, A-1 to A-3 have committed the murder and the jewels have been distributed among themselves. From A-1, one thali chain and bangles were recovered and from A-2 and A-3, the other gold bangles were recovered which were identified by P.W.2, the husband of the deceased. Admittedly, there is no explanation for the possession from the accused either in the cross-examination of witnesses or in Section 313 Cr.P.C. statement.

36. As rightly pointed out by the Supreme Court, the jewels like thali chain with identifiable features, cannot be passed from hand to hand readily and immediately, because, the accused would apprehend that they would be caught if those jewels were passed on to third party. Furthermore, in this case, M.O.2 series were pledged by A-1 to P.W.6 in between the period of one month. When once it is established that the jewels like thali (mangalya sutra) and gold bangles belonging to the deceased were recovered from the accused, then, the accused who had the special knowledge as to how they came into possession, has to explain and rebut the presumption.

37. Under those circumstances, in our view, the presumption both under Section 114 (a) and Section 106 of the Indian Evidence Act drawn against A-1 to A-3 from whom the jewels of the deceased identified by P.W.2 and also

the knife used for committing the offence were recovered, has not been rebutted. Consequently, the conviction and sentence imposed on A-1 to A-3 are liable to be confirmed and accordingly confirmed.

38. With regard to A-4, the contention urged by learned senior counsel is that the opinion given by P.W.12 finger print expert that the chance prints M.O.13 found on the betel nut box recovered from the scene of occurrence would tally with M.O.14 finger prints of A-4, is not admissible, in view of the decisions rendered by the Supreme Court in MAHMOOD VS. STATE OF U.P.(1976 CRL.L.J. 10 = AIR 1976 SC 69) and PARAMASIVAM AND ANOTHER VS. STATE OF TAMIL NADU (SUPREME COURT) (2002(2)L.W.(CRL.)836), wherein, it is

held that the order of the Magistrate concerned is mandatory before obtaining the finger print of the accused as contained in Section 5 of the Identification of Prisoners Act (hereinafter referred to as "the Act").

39. It is strenuously contended by learned Additional Public Prosecutor that Section 5 of the Act would not affect the power of the Police Officer under Section 4 of the Act to take finger prints of the person arrested in connection with the case and as such, P.W.15 is competent to take the finger prints, and therefore, the evidence of P.Ws.1 2 and 15 is admissible. Learned Additional Public Prosecutor cited a decision of the Supreme Court reported in 1978 CRL.L.J. 1251 = AIR 19 78 SC 1248 (SHANKARIA VS. STATE OF RAJASTHAN) to substantiate his contention. Relevant portion of the observations of the Supreme Court in 1978 Crl.L.J. 1251 is as follows:-

"79. Mr.Gambhir next contends that in view of S.5 of the Identification of Prisoners Act, it was incumbent on the police to obtain the specimen thumb impression of the appellant before a Magistrate, and since this was not done the opinion rendered by the Finger-Print Expert Mr.Tankha, by using those illegally obtained specimen finger impressions, must be ruled out of evidence. 80. The contention appears to be misconceived because in the State of Rajasthan, the Police were competent under S.4 of the Identification of Prisoners Act, to take the specimen finger-prints of the accused, and this they did, in the instant case, before the Superintendent of Police, Shri. K.P. Srivastava. It was not necessary for them to obtain an order from the Magistrate for obtaining such specimen finger-prints."

40. Above said observations are made by the Supreme Court to hold that the said evidence is admissible in the light of the existence of relevant rules framed by the Rajasthan Government under the powers conferred under Section 8 of the Identification of Prisoners Act.

41. Admittedly, no rules have been framed by Tamil Nadu State. Section 4 of the Identification of Prisoners Act would provide that any person who has been arrested in connection with the offence punishable with rigorous imprisonment for a term of one year or upwards, shall, if so required by a police officer, allow his measurements to be taken in the prescribed manner.

42. So, the prescribed manner for taking measurements of finger prints from the person arrested could be indicated either by the rules framed under Section 8 of the Act or any other rules and procedures framed by the State. The observation of the Supreme Court, as mentioned earlier, would indicate that if the rules are not framed, then it is necessary for the Police Officer to obtain permission under Section 5 of the Act. In this State, as noted above, no rules have been framed under the Act giving the procedure denoting the "prescribed manner" for taking finger prints.

43. When similar question was raised earlier before a Division Bench of this Court in 1994 (1) L.W. (CRL.) 58 (RAVANAN VS. STATE (INSPECTOR OF POLICE), KUMBAKONAM AND ANOTHER), it was argued that a Police Officer, during the course of investigation, after arresting a person, shall take him before the Magistrate concerned and obtain orders from the Magistrate before taking

finger prints under Section 5 of the Act, as Section 4 of the Act would not confer power to the Police Officer for taking the finger prints. This argument was rejected by the Division Bench and quoted the following observations made in Crl.A. No.169 of 1986, dated 7-2-1992:-

"The Act does not say that S.5 refers to the prescribed manner spelt out in S.4 of the Act. The power of the Magistrate under S.5 of the Act does not seem to affect the power of a police officer, to take finger prints or photographs of the persons arrested in connection with the various facts referred to under S.4 of the Act ... S.8 confers power on the State Government to make rules for the purpose of carrying into effect the provisions of this Act. It was stated by the learned Public Prosecutor, that the State of Tamil Nadu had not framed any rules for the purpose of carrying into effect the provisions of this Act. After careful consideration of Ss.4 and 5 of the Act, we are unable to agree with Mr.N.Dhinakar that invariably during investigation a person arrested must be taken before a Magistrate and orders obtained before the finger prints of such persons could be taken by a Police officer. Ss.4 and 5 operate in different fields and obviously if the State Government had made any rules for the purpose of carrying into effect the provisions of this Act, the Investigating Officer, ought to have followed such rules which would fall within the ambit of 'Prescribed manner' contemplated under S.4 of the Act. If the State Government has not made any rules under the Act, it will be the duty of the investigating officer, to follow Police Standing Order 836 . Police Standing Orders are in the nature of instructions given to be followed by the Police Force .....
"Finger impressions shall be taken only by officers declared by a Superintendent or, in the City of Madras, by the Commissioner of Police, to be qualified to take clear and well-rolled impressions."
..... We think it necessary that the State Government must make rules under S.8 of the Identification of Prisoners Act, 1920 for the purpose of carrying into effect the provisions of the Act. Some of the State Governments have made rules. A proper procedure in obtaining finger prints must be followed for otherwise, the sanctity of scientific evidence not only gets obliterated but also becomes an exercise in futility ..."

44. The abovesaid decision of the Division Bench of this Court would show that even in the absence of rules by the State under Section 8 of the Act, the Police Officer has to follow the Police Standing Orders, which gives the "prescribed manner" for taking the finger prints.

45. Let us now see as to whether the said procedure has been followed by P.W.15 who has taken the finger prints.

46. In this case, P.W.15 Inspector of Police would state that he had taken impressions, the finger prints
of A-4 on 24-7-1992 and sent him for remand. P.W.12 finger print expert who has given the opinion on a comparison as against A-4, would state that as per Ex.P-47, the finger prints of A-4 was taken by one Head Constable 2127. Admittedly, he has not been examined. Curiously, P.W.15 has not stated that he followed the procedures provided in the Police Standing Orders relating to

taking of finger prints. It has not been established in this case that the said Head Constable or the Inspector of Police P.W.15 has been declared to be a competent officer to take finger print in the "prescribed manner" as provided under Section 4 of the Act.

47. The method of taking finger prints with reference to the appliances forms part of Police Standing Order-836(4)(a). Police Standing Order 836(4)(d) states that the prints should invariably be taken on an authorised finger print slip in Form No.141 thereunder. As per Police Standing Order 836(4)(k), the finger impression shall be taken in the moffusil areas only by the Officers declared by the Superintendent of Police or in the City of Madras by the Commissioner of Police to be qualified to take clear well rolled impressions.

48. Admittedly, no evidence has been adduced to show that either P. W.15 or the Head Constable who took finger prints from A-4, has been declared either by the Superintendent of Police or the Commissioner of Police, as the case may be, to be qualified as a competent Officer to take clear well rolled impressions. There is also no evidence to show that the finger prints were taken in Form No.141 specified in the Police Standing Orders. There is also no indication that the method of taking finger prints as provided in Police Standing Order 836(4)(a) had been followed. Thus, it is clear that none of the provisions of the Police Standing Order 836, relating to taking of the finger prints of the accused, had been followed by the investigating agency.

49. That apart, M.O.15 betel nut box was taken from the scene of occurrence on 23-6-1992. P.W.16 finger print expert on the same day, went to the scene of occurrence and P.W.14, the photographer took photos and chance prints found on M.O.15 kept in the scene of occurrence. Admittedly, P.W.13, the first investigating officer did not prepare any mahazar for recovery of M.O.15. No reference had been made about M.O.15 in the observation mahazar in Ex.P-2. Though it is stated by P.W.15 that the betel nut box which contained M.O.13, the chance prints of A-4 was sent on 3-7-1992 to the Court. P.W.8, the Court clerk would state that the same was received only on 23-7-1992. There is no explanation on the side of the prosecution as to why there was no recovery of mahazar in regard to the recovery of M.O.15 and as to why M.O.15 containing M.O.13 chance prints, was sent to the Court nearly after a month.

50. In the light of the above fact situation, we are unable to act upon the finger print expert's opinion Ex.P-26, even assuming that the Head Constable or the Inspector of Police could invoke power under Section 4 of the Act by following the procedure under the Police Standing Order to take the finger prints without approaching the Magistrate under Section 5 of the Act.

51. As such, we are constrained to hold that A-4 cannot be convicted merely on the basis of the finger print expert's opinion, which in our considered opinion, is insufficient in the present facts of the case, as the same cannot be accepted in view of violation of prescribed procedures. Accordingly, the conviction and sentence imposed on A-4 are liable to be set aside.

52. In the result, the conviction and sentence imposed on A-1 to A-3 are confirmed. The conviction and sentence imposed on A-4 are set aside. Since A-4 is in jail, he is directed to be set at liberty forthwith unless he is required in any other case. The appeal is partly allowed.

53. Before parting with the case, we are constrained to remind the Government the necessity for framing the rules regarding the " prescribed manner" for taking measurements of the finger prints from the arrested person.

54. The Supreme Court in AIR 1976 SC 69 (supra) and 2002 (2) L.W. (Crl.) 836 (supra) would specifically state that in the absence of rules, the Police Officer has to approach the Magistrate concerned under Section 5 of the Act for obtaining permission for taking finger prints of the accused and if the same was not done, the opinion of the finger print expert would become inadmissible.

55. In this case, we have stated that even though the rules have not been framed under Section 8 of the Act, there are procedures provided under the Police Standing Orders for taking the finger prints and the compliance of those rules would satisfy the "prescribed manner" as provided under Section 4 of the Act.

56. However, we have acquitted A-4 on facts, since the procedures prescribed under the Police Standing Orders have not been complied with.

57. Yet another argument is possible to contend that even when the provisions of Police Standing Orders have been complied with, the said compliance would not make the finger print expert's opinion admissible, as the Police Standing Orders do not have any statutory force. To avoid this criticism, it is better for the State to frame rules prescribing the procedures for the same.

58. Under those circumstances, we think it necessary to direct the State Government to make the rules under Section 8 of the Identification of Prisoners Act, 1920 for the purpose of carrying into effect the provisions of the Act. As a matter of fact, similar direction has been given by a Division Bench of this Court earlier in Crl.A. No.169 of 1986, dated 7-2-1992, as indicated in the earlier paragraphs. But still, such a direction has not been complied with by the State Government.

59. It is noticed that several State Governments have made rules. In our view, a proper procedure in obtaining finger prints from the accused, might be followed. Otherwise, the sanctity of the scientific evidence not only gets obliterated, but also becomes an exercise in futility.

60. In a similar situation, in a case coming from Rajasthan, the Supreme Court in AIR 1978 SC 1248 (supra), while rejecting the contention of learned counsel for the accused that in view of Section 5 of the Act, it was incumbent on the part of the investigating agency to obtain the specimen thumb

impression of an accused before a Magistrate or after obtaining an order of the Magistrate and since that was not done, the opinion rendered by the finger print expert must be ruled out of evidence, would observe that the said contention appears to be misconceived, because, in the State of Rajasthan, the Police were competent under Section 4 of the Act to take specimen impressions of the accused in the presence of Superintendent of Police and as such, it was not necessary for the Police to obtain order from the Magistrate concerned.

61. Thus, it is clear that by framing proper rules under Section 8 of the Act, giving the procedure for taking the finger prints, the sanctity of the scientific evidence adduced by the finger print expert would certainly save the prosecution. Therefore, it is desirable for the State Government to frame appropriate rules under Section 8 of the Identification of Prisoners Act, giving clear-cut guidelines and procedures indicating the "prescribed manner" as provided under Section 4 of the Act for taking the finger prints of the accused in custody.

62. Accordingly, learned Public Prosecutor is directed to get a copy of this judgment and send the same to the State Government with a covering letter, intimating our direction to enable the Government to frame the rules expeditiously.

Index: Yes
Internet: Yes
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To
1.The Principal Sessions Judge, Madurai.
2.The Judicial Magistrate-II, Madurai.
3. -do- through the Chief Judicial Magistrate, Madurai.
4. The Superintendent, Central Prison, Madurai.
5. The Public Prosecutor, High Court, Madras.
6. The Inspector of Police,
G-1 Thilagar Thidal Police Station (Crime),
George Town (North), Madurai.

7. The District Collector, Madurai.

8. The Inspector General of Police, Chennai-4.

9. The Secretary, Home Department, Secretariat, Chennai-9.

10. The Secretary, Law Department, Secretariat, Chennai-9.